

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



December 22, 2003

**Agenda ID # 3051**  
**Quasi-Legislative**

TO: PARTIES OF RECORD IN RULEMAKING 02-11-039

This is the second revised draft decision of Administrative Law Judge (ALJ) Mattson. It replaces the prior draft decision. This item was on the Commission's Agenda on December 12, 2003 and held to January 8, 2004. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rules 77.2 and 77.5, comments on the draft decision must be filed within 20 days of its mailing, and reply comments must be filed within five days of the date comments are mailed.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Mattson at [BWM@cpuc.ca.gov](mailto:BWM@cpuc.ca.gov). Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ Phil Weismehl for  
Angela K. Minkin, Chief  
Administrative Law Judge

ANG:avs

Attachment

Decision **REVISED DRAFT DECISION OF ALJ MATTSON** (Mailed 12/22/2003)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Rulemaking to implement the provisions of  
Public Utilities Code § 761.3 enacted by Chapter  
19 of the 2001-02 Second Extraordinary  
Legislative Session.

R.02-11-039  
(Filed November 21, 2002)

**ORDER REGARDING SEMPRA ENERGY AS A RESPONDENT**

On November 21, 2002, the Commission opened this proceeding and named eight respondents. On September 4, 2003, the Commission named 16 additional respondents. (Decision (D.) 03-09-002.)<sup>1</sup> Among the additional respondents was an entity identified as Sempra represented by David Follett.

On September 15, 2003, Sempra Energy Resources (SER) and Sempra Energy Elk Hills Power Corp. (SEEHP) filed and served a motion for modification or clarification of D.03-09-002. By Ruling dated September 23, 2003, the motion was granted by clarifying and correcting the named respondent from Sempra to Sempra Energy, represented by Follett.

On October 14, 2003, Follett filed and served a motion for Sempra Energy asking for reconsideration of the Ruling dated September 23, 2003. Sempra Energy asks that the Commission clarify that it is not an appropriate respondent,

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<sup>1</sup> Also, on October 2, 2003, the Commission deleted two respondents. (D.03-10-012.) On November 13, 2003, the Commission deleted a respondent and added a respondent. (D.03-11-009.)

and remove Sempra Energy from the list of named respondents. No responses have been received. The motion is denied.

### Discussion

This proceeding is opened for the purpose of implementing Public Utilities Code § 761.3.<sup>2</sup> Facilities covered by this law include, with limited exceptions, all electric generation facilities “owned by an electrical corporation or located in” California.<sup>3</sup> (§ 761.3(a).) An electrical corporation includes “every corporation or person owning, controlling, operating, or managing any electric plant for compensation within” California, with some exceptions.<sup>4</sup> (§218(a).) Respondents are public utilities, electrical corporations, and owners and operators of divested plant in California subject to § 761.3. (*See* D.03-09-002, *mimeo.*, pages 2 - 3.)

The Ruling dated September 23, 2003 relied on the company’s statement that Sempra Energy “is a holding company that through various subsidiaries and

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<sup>2</sup> All statutory references are to the Public Utilities Code unless specified otherwise.

<sup>3</sup> Exceptions include (a) nuclear-powered plants, (b) qualifying facilities, (c) generation installed exclusively to serve a customer’s own load, (d) facilities owned by a local publicly owned electric utility, (e) public agency electric facilities that generate electricity incidental to the provision of water or wastewater treatment, and (f) facilities owned by a city and county operating as a public utility. (§ 761.3(d) and (h).)

<sup>4</sup> Exceptions include (a) where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others, (b) a corporation or person employing cogeneration technology or a non-conventional power source for limited purposes, (c) a corporation or person employing landfill gas technology for limited purposes, (d) a corporation or person employing digester gas technology for limited purposes, or (e) a corporation or person employing cogeneration technology or non-conventional power sources that physically produced electricity prior to January 1, 1989, and furnished that electricity to immediately adjacent real property for use thereon prior to January 1, 1989. (§ 218(a) – (e).) These exceptions are generally already within the exceptions covered by § 761.3(d) and (h).

affiliates, provides a wide spectrum of electric...products and services to a diverse range of customers...in California...” (SER and SEEHP Motion dated September 15, 2003, pages 3-4.) As a result, the Ruling concluded that “Sempra Energy is understood to be an electrical corporation that owns, controls, operates, or manages electric plant for compensation within California through various subsidiaries and affiliates.” (Ruling dated September 23, 2003, page 4.)

The latest motion states that “Sempra Energy does not own, control, operate, or manage an electric generation facility.” (Motion dated October 14, 2003, page 6.<sup>5</sup>) Based on this representation, the Assigned Administrative Law Judge (ALJ) filed a draft decision finding that: “Sempra Energy does not own, control, operate or manage any electric plant for compensation within California or located in California, either directly or indirectly through any subsidiaries, affiliates or related corporate entities.” The draft decision concluded that Sempra Energy should not be a respondent.

In comments on the draft decision, Sempra Energy recommends deletion of the phrase “either directly or indirectly through any subsidiaries, affiliates or related entities.” Sempra Energy asserts that otherwise the decision “could be mistakenly read to imply that the Sempra Energy Motion represented to the Commission that Sempra Energy has no subsidiaries, affiliates or related

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<sup>5</sup> All pleadings are filed in compliance with Rule 1 of the Commission’s Rules of Practice and Procedure (Rules), which says in relevant part: “Any person who signs a pleading...or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to...never mislead the Commission or its staff by an artifice or false statement of fact or law.” We rely on the truthfulness of all statements in the pleading filed by Follet for Sempra Energy.

corporate entities that own, control, operate or manage an electric generation facility.” (Comments dated December 9, 2003, page 3.)

We are not persuaded that the motion should be granted. The Commission has named many entities as respondents that it believes are subject to § 761.3. Respondents are named, among other reasons, so that they may be notified of this proceeding, participate, comment, provide the Commission with the benefit of their expertise and views, and be made aware of possible forthcoming duties and obligations. Specific jurisdictional questions may be dealt with elsewhere as needed.

The Commission is generally not sympathetic to corporations seeking to avoid responsibility - or perhaps coincidentally escaping responsibility - by enveloping themselves directly or indirectly in layers of limited liability companies, subsidiaries, affiliates, or other corporate structures and arrangements. A named respondent may be released based on clear evidence that it is a member of a specifically excluded group (*e.g.*, § 761.3 provides exclusions for some nuclear powerplants, qualifying facilities, publicly owned facilities). If any question exists about respondent status, a respondent should not be released at this time. The comments of Sempra Energy on the draft decision provide more confusion than illumination.

Many respondents have stated that they reserve the right to challenge the Commission naming them as respondents at the appropriate time and place. They accept deferring the issue until later, and state that they intend to actively participate and help the Commission with the complex task presented by § 761.3. This approach is reasonable. We have specifically endorsed it with regard to two respondents. (D.03-12-023.) The approach remains reasonable, and should similarly be adopted here.

Moreover, we point out that every corporation and person must comply with § 761.3 to the extent that law applies, whether or not named a respondent. If we err, we err on the side of retaining Sempra Energy as respondent when that is not the case, rather than removing Sempra Energy when Sempra Energy is a respondent. Sempra Energy is subject to § 761.3 to the extent the law applies to Sempra Energy, however, whether or not Sempra Energy is a named respondent.

### **Comments on Draft Decision**

On December 4, 2003, the draft decision of ALJ Mattson was filed and served on parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed and served on December 9, 2003, by Sempra Energy. On December \_\_\_, 2003, the revised draft decision of ALJ Mattson was filed and served. Comments were filed and served on \_\_\_ by \_\_\_\_\_. Reply comments were filed and served on \_\_\_\_\_ by\_\_\_\_\_.

### **Assignment of Proceeding**

Carl W. Wood is the Assigned Commissioner. Burton W. Mattson is the assigned ALJ regarding this portion of the proceeding.

### **Findings of Fact**

1. On October 14, 2003, Sempra Energy filed and served a motion and no responses have been received.
2. On December 9, 2003, Sempra Energy filed comments on a draft decision in which Sempra Energy recommends deleting a phrase regarding whether or not Sempra Energy owns, controls, operates or manages an electric plant for compensation either directly or indirectly through subsidiaries, affiliates or related entities.

3. Sempra Energy does not seek exclusion from respondent status based on its owning, controlling, operating or managing specifically excluded facilities (*e.g.*, nuclear powerplants, qualifying facilities).

4. Several respondents have stated that they may later challenge the Commission naming them as respondents but they accept deferring the issue.

5. It is reasonable to defer questions regarding respondents status until later, and retain named respondents now.

**Conclusions of Law**

1. The motion of Sempra Energy dated October 14, 2003 should be denied.

2. This order should be effective immediately in order to clarify respondent status and the service list without delay.

**O R D E R**

**IT IS ORDERED** that the motion of Sempra Energy dated October 14, 2003 is denied. The proceeding remains open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.